

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

Phyllis Wehlage, *et al.*, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

Evergreen at Arvin LLC; Evergreen at  
Bakersfield LLC; Evergreen at Lakeport  
LLC; Evergreen at Heartwood LLC;  
Evergreen at Springs Road LLC; Evergreen  
at Tracy LLC; Evergreen at Oroville LLC;  
Evergreen at Petaluma LLC; Evergreen at  
Gridley (SNF) LLC; Evergreen at Chico  
LLC; Evergreen at Salinas LLC; Evergreen  
at Fullerton LLC,

Defendants.

Case No. 4:10-cv-05839-CW

**~~PROPOSED~~ ORDER GRANTING CLASS  
COUNSEL'S APPLICATION FOR  
ATTORNEYS' FEES AND EXPENSES  
AND FOR SERVICE AWARDS**

Date: October 4, 2012  
Time: 2 p.m.  
Judge: The Honorable Claudia Wilken  
Courtroom: 2, 4th Floor

1        These matters come before the Court upon Plaintiffs' and Class Counsel's Motion for  
 2        Attorneys' Fees and Expenses and for Service Awards for Class Representatives, filed on July 25,  
 3        2012. Upon consideration of the papers and arguments presented, the Court ORDERS as follows:

4        Plaintiffs and Class Counsel ask the Court to approve the payment of attorneys' fees and  
 5        expenses, and service awards for the Class Representatives, that Defendants have agreed to pay  
 6        under the proposed Settlement Agreement ("Settlement") entered into by the parties and  
 7        submitted to the Court for approval. The Court finds that Class Counsel negotiated at arms-  
 8        length with Defendants to arrive at a fee that all parties concluded is reasonable. The award of  
 9        Class Counsel's fees and costs will be paid directly by Defendants and will not affect the  
 10        injunctive relief benefiting the Class. Under these circumstances, the Court finds that the agreed  
 11        amounts for attorneys' fees and expenses, and service awards for the Class Representatives, are  
 12        presumed to be reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for  
 13        attorney's fees should not result in a second major litigation. Ideally, of course, litigants will  
 14        settle the amount of a fee."); *In re Apple Computer, Inc. Derivative Litig.*, 2008 U.S. Dist. LEXIS  
 15        108195, at \*12 (N.D. Cal. Nov. 5, 2008) ("A court should refrain from substituting its own value  
 16        for a properly bargained-for agreement."); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D.  
 17        Ga. 2001) (absent evidence of collusion or detriment to a party, court "should give substantial  
 18        weight to a negotiated fee amount, assuming that it represents the parties' best efforts to  
 19        understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees.").

20        As explained herein, the Court finds that the agreed-upon attorneys' fees, expenses, and  
 21        service awards are fair, reasonable, and justified given the circumstances of this case, and are  
 22        hereby approved. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 n.2  
 23        (9th Cir. 1994) (overriding principle is that the fee award be "reasonable under the  
 24        circumstances").

#### 25        Attorneys' Fees

26        Class Counsel seek an award of attorneys' fees in the amount of approximately  
 27        \$1,835,857.82, which is lower than their combined lodestar in this case. *See Declaration of*  
 28        Robert J. Nelson, ¶ 16-17. Thus, Class Counsel do not seek a multiplier on their lodestar, and in

1 fact the requested fee is a negative multiplier (-.79). The Court finds that this award is appropriate  
2 here.

3 Because Plaintiffs asserted claims under California law, California law governs the award  
4 of attorneys' fees. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Under  
5 well-established California law, the Court has the power to award reasonable attorneys' fees and  
6 costs where, as here, a litigant proceeding in a representative capacity secures a "substantial  
7 benefit" for a class of persons. *Serrano v. Priest*, 20 Cal. 3d 25, 38 (1977). The two primary  
8 methods for determining reasonable fees in a class case are the "lodestar-multiplier" method and  
9 the "percentage of the fund" method. *See Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th  
10 224, 254 (2001); *accord, Hanlon v. Chrysler Group, Inc.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

11 The Court will use the lodestar-multiplier method as the primary method for analyzing  
12 this fee request, as there is no common fund. *See Ketchum v. Moses*, 24 Cal. 4th 1122, 1134  
13 (2001); *Lealao v. Beneficial Calif. Inc.*, 82 Cal. App. 4th 19 (2000); *see also Goldkorn v. County*  
14 *of San Bernardino*, 2012 U.S. Dist. LEXIS 17934, at \*25 (C.D. Cal. Feb. 13, 2012). The first  
15 step in the lodestar analysis is to multiply the number of hours counsel reasonably expended on  
16 the litigation by a reasonable hourly rate. *See Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th  
17 553, 579 (2004); *Hanlon*, 150 F.3d at 1029. Once this raw lodestar figure is determined, the  
18 Court may take into consideration certain factors to adjust the lodestar, including, *inter alia*: (1)  
19 the results obtained; (2) the novelty and difficulty of the questions involved; (3) the requisite legal  
20 skill necessary; (4) the preclusion of other employment due to acceptance of the case; and (5)  
21 whether the fee is fixed or contingent. *Serrano*, 20 Cal. 3d at 48; *Hanlon*, 150 F.3d at 1029  
22 (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)).

23 The Court finds that Class Counsel's lodestar in this case, as set forth in the declaration of  
24 Class Counsel, is reasonable. Specifically, Class Counsel and their professional staffs have spent  
25 approximately 4,505 hours working on this case, for a total unadjusted lodestar of approximately  
26 \$2,231,382.27 to date, exclusive of costs. Nelson Decl., ¶ 17, Ex. A. The Court finds that the  
27 billing rates used by Class Counsel to calculate their lodestar are reasonable and in line with  
28 prevailing rates in this District for personnel of comparable experience, skill, and reputation.

1 Nelson Decl., ¶ 18; *see Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1994). The Court further finds  
 2 that the number of hours billed in this case by Class Counsel and their attorneys and staff is  
 3 reasonable. Nelson Decl., ¶¶ 6-15, 17; *Serrano*, 20 Cal. 3d at 49 (counsel is entitled to recover  
 4 for all hours reasonably expended); *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir.  
 5 2000) (same).

6 The Court now turns to the *Serrano* enhancement factors, and finds that they support  
 7 awarding the fee requested here, as follows.

8 *First*, Class Counsel achieved significant benefits for the Class Members and other elders.  
 9 *See Thayer v. Wells Fargo Bank*, 92 Cal. App. 4th 819, 838 (2001) (results obtained by counsel  
 10 are an important factor in determining a reasonable fee); *accord, Kerr*, 526 F.2d at 70. Both the  
 11 Ninth Circuit and the Federal Rules Advisory Committee have recognized that injunctive relief  
 12 may properly figure in a reasonable award of attorneys' fees. *See Vizcaino*, 290 F.3d at 1049  
 13 ("Incidental or nonmonetary benefits conferred by the litigation are a relevant circumstance" in  
 14 determining fee awards); Advisory Committee Notes to Fed. R. Civ. P. 23(h) (2003  
 15 Amendments) ("[I]t is important to recognize that in some class actions the monetary relief  
 16 obtained is not the sole determinant of an appropriate attorney fees award.") (citation omitted);  
 17 *see, e.g., In re HP Laser Printer Litig.*, 2011 U.S. Dist. LEXIS 98759, at \*5, 12-18 (C.D. Cal.  
 18 Aug. 31, 2011) (awarding attorneys' fees as negotiated by the parties, based on lodestar, where  
 19 the "primary relief" secured by a class settlement was injunctive in nature); *Osher v. SCA Realty*  
 20 *I, Inc.*, 945 F. Supp. 298, 301 (D.D.C. 1996) (awarding attorneys' fees to class and derivative  
 21 counsel who negotiated a settlement requiring consummation of corporate restructuring).

22 Under the present Settlement, Defendants have agreed to a stipulated injunction that  
 23 requires them to consistently utilize staffing practices at their skilled nursing facilities which will  
 24 ensure that they comply with applicable California law. This consent decree not only mandates  
 25 that Defendants immediately comply with the law by adequately staffing their Facilities, but also  
 26 requires them to extensively document their compliance and submit to ongoing review by an  
 27 independent monitor. The Court finds that the monitoring and oversight compelled by the  
 28 injunction will provide the residents of the Facilities with a level of care they would not otherwise

1 enjoy. Should Defendants fail to comply, the Court retains jurisdiction and the ability to order  
 2 remedial sanctions. The record before the Court shows that this injunction carries a substantial  
 3 value and obtains fair and adequate relief for the Class of skilled nursing home residents.

4 *Second*, this case involved numerous complex and novel issues of both fact and law that  
 5 presented significant risks. *See Ketchum*, 24 Cal. 4th at 1132; *Serrano*, 20 Cal. 3d at 49; *Hanlon*,  
 6 150 F.3d at 1029. The parties litigated four rounds of motions to dismiss, and the process of  
 7 litigating these complex motions informed the settlement negotiations. In addition, the process of  
 8 litigating this series of motions placed this case at a relatively more advanced stage than many  
 9 cases which settle prior to a litigated class certification determination;. Nelson Decl., ¶ 7; *cf.*  
 10 *Hanlon*, 150 F.3d at 1026. Class Counsel faced several major obstacles in prosecuting this case,  
 11 including Washington's strict alter-ego law and the Defendants' tenuous financial condition.  
 12 While the Settlement does not provide for payments to the unnamed Class members, the record  
 13 discloses that such payments are not realistically possible because they would likely result in the  
 14 Defendants and/or their corporate affiliates entering bankruptcy proceedings, and the Settlement  
 15 includes no release. *See Schwarm v. Craighead*, 814 F. Supp. 2d 1025, 1029-33 (E.D. Cal. 2011).  
 16 Given all the circumstances, the Court finds that Class Counsel successfully navigated the risks to  
 17 obtain favorable class-wide injunctive relief.

18 *Third*, Class Counsel prosecuted this case on a purely contingent basis, agreeing to  
 19 advance all necessary expenses, knowing that they would only receive a fee if there were a  
 20 recovery. Nelson Decl., ¶ 4; *see In re Washington Public Power*, 19 F.3d at 1299-1300  
 21 ("Contingent fees that may far exceed the market value of the services if rendered on a non-  
 22 contingent basis are accepted in the legal profession as a legitimate way of assuring competent  
 23 representation for plaintiffs who could not afford to pay on an hourly basis regardless whether  
 24 they win or lose."); *Ketchum*, 24 Cal. 4th at 1138; *Serrano*, 20 Cal. 3d at 48; *Kerr*, 526 F.2d at 70.  
 25 Class Counsel expended considerable time and money in this case with no guarantee of  
 26 reimbursement. Nelson Decl., ¶ 4. They had to forego other work in order to devote the requisite  
 27 amount of time, resources, and energy to handle this demanding matter. Nelson Decl., ¶ 5;  
 28 *Serrano*, 20 Cal. 3d at 49; *Ketchum*, 24 Cal. 4th at 1132; *Kerr*, 526 F.2d at 70.

1 Fourth, the reputation, experience, and ability of Class Counsel were essential to the  
2 success of this litigation. Nelson Decl., ¶ 3; *Serrano*, 20 Cal. 3d at 49; *Hanlon*, 150 F.3d at 1029.

3 Finally, while the benefits do not take the form of a common fund, the reasonableness and  
4 propriety of the requested fee are confirmed by a cross-check based on a percentage of the  
5 estimated monetary value of the injunctive relief obtained. *See Hanlon*, 150 F.3d at 1029  
6 (affirming fee award based on the lodestar approach where the district court performed a cross-  
7 check using the percentage approach with respect to the estimated value of the injunctive relief).  
8 The agreed-upon fee here represents approximately 19-22% of the estimated value of the  
9 injunctive relief obtained under the Settlement. *See* Declaration of Christopher J. Healey, ¶¶ 11-  
10 17 (Dkt. No. 107–11) (discussing two separate valuation methods, each of which the Court finds  
11 to be reasonable, yielding estimates of \$8.4 million and \$9.75 million, respectively, for the class-  
12 wide injunctive relief). These percentage estimates are less than the “benchmark” percentage of  
13 25% applied in the Ninth Circuit, and are reasonable, particularly in light of the important  
14 structural change that Class Counsel achieved here, the complexity and novelty of the issues, and  
15 the contingent nature of Class Counsel’s fee. *See Vizcaino*, 290 F.3d at 1047-1050.

16 For the foregoing reasons, the Court finds that the requested attorneys’ fees of  
17 \$1,835,857.82 are fair, reasonable, and justified, and should be granted.

#### 18 Reimbursement of Out-of-Pocket Expenses

19 Class Counsel also seek reimbursement of their out-of-pocket expenses in this litigation,  
20 in the amount of \$129,142.18. Nelson Decl., ¶ 21. As with fees, reimbursement of costs here  
21 will be paid directly by the Defendants and will not affect the injunctive relief benefiting the  
22 Class. Nelson Decl., ¶ 23. Class Counsel are entitled to reimbursement of the costs they  
23 reasonably advanced to investigate and prosecute this case. *See In re Media Vision Tech. Sec.*  
24 *Litig.*, 913 F.Supp. 1362, 1366 (N.D. Cal. 1996) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S.  
25 375, 391–92 (1970)); *Staton*, 327 F.3d at 974. The Court finds that Class Counsel’s out-of-  
26 pocket expenses were reasonably incurred in connection with the prosecution of this litigation,  
27 were advanced by Class Counsel for the benefit of the Class, and should be reimbursed in full.

Service Awards for Class Representatives

“[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments.” *Staton*, 327 F.3d at 977; *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (service awards “are fairly typical in class action cases.”). Such awards are “intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action.” *Id.*; *see also Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

The requested service awards here are justified. In addition to lending their names to this case, and thus subjecting themselves to public attention, the twelve Class Representatives actively participated in the litigation, consulting with Class Counsel on a regular basis. Nelson Decl., ¶ 4. Moreover, the \$2,500 awards requested here will be paid directly by Defendants, will not affect the injunctive relief benefiting the Class, and are reasonable in amount. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (approving service awards of \$5,000); *Hughes v. Microsoft Corp.*, 2001 WL 34089697, at \*12-13 (W.D. Wash. Mar. 26, 2001) (\$7,500, \$25,000, and \$40,000 awards).

Therefore, the Court finds that Class Representatives Phyllis Wehlage, John Michael Beauvais, Isabel S. Simental-Collier, Earl Roberts, Sherri Avalos, Marie-Louise Patch, Howard Richard Starts, Dea Barry, Frances Benveniste, Paige Melendez, Tamara Dillon, and Francis Nishida are each entitled to receive service awards in the amount of \$2,500 for their efforts on behalf of the Class.

For the reasons set forth above, the Court hereby GRANTS Plaintiffs’ and Class Counsel’s Motion for Attorneys’ Fees and Expenses and for Service Awards for Class Representatives, and ORDERS as follows:


1. Class Counsel is hereby awarded attorneys’ fees in the amount of \$1,835,857.82 and reimbursement of out-of-pocket expenses in the amount of \$129,142.18; and

2. Class Representatives Phyllis Wehlage, John Michael Beauvais, Isabel S. Simental-Collier, Earl Roberts, Sherri Avalos, Marie-Louise Patch, Howard Richard Starts, Dea

1 Barry, Frances Benveniste, Paige Melendez, Tamara Dillon, and Francis Nishida are hereby  
2 awarded service awards of \$2,500 each.

3  
4 IT IS SO ORDERED.

5 Dated: 10/4/2012

6   
The Honorable Claudia Wilken  
7 Chief Judge, United States District Court